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Supreme Court, U.S.
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No. 02-1441

IN THE

Supreme Court of the United States

THOMAS PAPPAS,

Petitioner,

—v.—

RUDOLPH GIULIANI, Mayor of the City of New York; HOWARD SAFIR, Commissioner of the Police Department of the City of New York; and the CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION

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9 pp

TABLE OF CONTENTS

THE "PUBLIC CONCERN" EXCEPTION
TO THE *PICKERING* DOCTRINE
PERTAINS TO PERSONAL EMPLOYMENT
GRIEVANCES AND HAS NO BEARING
ON PUBLIC-EMPLOYEE SPEECH
UNRELATED TO THE WORKPLACE 2

CONCLUSION 6

TABLE OF AUTHORITIES

Connick v. Myers, 461 U.S. 138 (1983) 4-5

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 2

Texas v. Johnson, 491 U.S. 397 (1989) 6

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In their Brief in Opposition the respondents contend that the Court should not grant a writ of *certiorari* in this matter because, according to the respondents, the petitioner's expressive activity did not bear on a matter of "public concern" within the meaning of *Pickering v. Board of Education* and its progeny. Because this contention rests on a fundamental misunderstanding of the *Pickering* doctrine, the petitioner files

this short reply.[1]

THE "PUBLIC CONCERN" EXCEPTION TO THE *PICKERING* DOCTRINE PERTAINS TO PERSONAL EMPLOYMENT GRIEVANCES AND HAS NO BEARING ON PUBLIC-EMPLOYEE SPEECH UNRELATED TO THE WORKPLACE.

The respondents assert that the petitioner's mailings, "even if they were speech, do not amount to speech on a matter of a matter of public concern." Respondents' Opposition at 15. More specifically, the respondents contend that the record in this matter establishes that when the petitioner mailed political materials from his home to various organizations "he had no intention of conveying any message to the general public; he merely sought to have these organizations stop sending him mailings as a matter of personal, private interest." *Id.* at 16.

At the outset, any suggestion that Mr. Pappas's mailing of political materials is not entitled to protection under the *Pickering* doctrine because he did not seek to convey a message to the "general public" is foreclosed by the Court's decision in *Givhan v. Western Line Consolidated School District.* There the Court squarely rejected the proposition "that a public employee forfeits his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly." 439 U.S. 410, 414 (1979) (holding that *Pickering* protections extended to private

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[1]The respondents offer additional arguments in their opposition, but these matters are covered sufficiently in the Petition so as not to justify further discussion.

communications between school teacher and principal).

Beyond the issue of the public nature of the expression, the respondents rely on what they deem to be the "personal" motivation behind the petitioner's expressive activity. According to the respondents, core expressive activity such as the mailing of political materials can be disqualified from being speech on a matter of "public concern," as that concept is used in the *Pickering* doctrine, if the speaker acts out of "personal" motives. This suggestion, as the respondents note in their brief, draws some support from a handful of lower court decisions. *See* Respondents' Brief in Opposition at 15-17.[2]

It does not, however, draw any support from the decisions of this Court. To the contrary, the respondents' position fundamentally misconstrues this Court's formulation of the "public concern" component of the *Pickering* doctrine, and , if accepted, would significantly erode even further the First Amendment rights of public employees.

In assessing the respondents' position, it is important to recognize first that the "public concern" component of the *Pickering* doctrine represents a further reduction in the free-

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[2]Though the Second Circuit decision ruling against Mr. Pappas in this matter did not turn on a determination that the speech at issue here was not on a matter of public concern, *see* A5-6 (identifying relevant legal standards and assuming without deciding that speech was on a matter of public concern); *see also* A21-23 (dissenting opinion by Judge Sotomayor finding speech on a matter of public concern), the concurring opinion did take the position advanced by the respondents in their opposition, *see* A15-20 (McMahon, D.J., concurring).

speech protections afforded public employees. Under the *Pickering* doctrine, speech that does not qualify as speech on a matter of "public concern" does not qualify for even the reduced *Pickering* protections. *See Connick v. Myers*, 461 U.S. 138, 146-47 (1983). Given this, the broader the category of employee speech that can be said not to be on a matter of public concern, the greater the speech that is unprotected.

In light of the "public concern" component's role in the *Pickering* analysis, the Court has described speech not on a matter of "public concern" narrowly to encompass only that speech pertaining to a public employee's personal employment or to some particular aspect of the public employer's workplace that is unrelated to public concerns. Thus, in the one *Pickering* case in which it has found speech not to be on a matter of "public concern," the Court in *Connick* held that most of an office survey distributed by an assistant district attorney did not qualify for protection under even the *Pickering* doctrine. *See* 461 U.S. at 147-48. In doing so, the Court explained the "public concern" test in the following terms:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by the public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded

by the First Amendment to those who do not work for the State.

461 U.S. at 147 (emphasis supplied).

Thus, the public-employee speech exempt from even the reduced protections of the *Pickering* doctrine is that speech amounting to "employee grievances." The Court has never suggested that public-employee speech undertaken outside the workplace and having nothing to do with the workplace is subject to the "public concern" inquiry.

The speech at issue in this case indisputably did not concern any employment grievance on the part of Mr. Pappas. Indeed, his speech was wholly unrelated to the workplace. The "public concern" component of the *Pickering* doctrine simply is irrelevant in a case such as this.

To accept the respondents' position would be to unmoor the *Pickering* doctrine from its basic premise: that the government can punish speech related to the workplace because in those circumstances the government is acting as employer rather than sovereign. Consistent with this premise, an employment grievance is the type of speech that most implicates the government's interest as employer, and the speaker's motive may be relevant to determining whether the speech is intended to advance a personal employment concern rather than address a matter of "public concern."

This type of motive inquiry makes no sense, however, in the context of speech unrelated to the workplace. Just as one would not one inquire into the specific motive of a public employee fired for participating in a public parade, no inquiry should be undertaken into the motive of Mr. Pappas for his core expressive activity -- the mailing of political materials -- to make the threshold determination whether that activity was

protected by the First Amendment.[3] The motive for core expressive activity unrelated to the workplace is irrelevant to the *Pickering* analysis and provides no basis for denying a writ of *certiorari* in this matter.

CONCLUSION

For all the foregoing reasons and for the reasons set out in the Petition, the petitioner urges the Court to grant a writ of *certiorari* in this matter.

Respectfully submitted,

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[3]This is not a case of "expressive conduct," for which motive is relevant for determining whether the conduct is protected by the First Amendment. *See, e.g. Texas v. Johnson*, 491 U.S. 397, 404-05 (1989) (holding that burning of flag constituted protected expressive conduct).